76-871

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

[redacted]

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS FORD MOTOR COMPANY AND FORD MARKETING CORPORATION IN OPPOSITION

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1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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OCTOBER TERM, 1976

No. 76-781

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

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I.

OPINIONS BELOW

The opinions of the District Court appear as Appendices A and B to the Petition and are not published. The opinion of the Court of Appeals appears as Appendix C to the Petition, and is reported at 1976-2 Trade Cases ¶ 61,086, — F.2d —.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III.

QUESTION PRESENTED

Whether, under the liberal construction placed upon the antitrust Complaint herein, the Court of Appeals erred in reversing the District Court's grant of judgment on the pleadings and remanding for further proceedings.

IV.

STATUTE INVOLVED

The statute involved in this litigation is Section 1 of the Sherman Act, 15 U.S.C. §1, which is set forth in Appendix D of the Petition.

V.

STATEMENT

Before this Court, Ford Motor Company and Ford Marketing Corporation (hereinafter collectively referred to as "Ford") take the somewhat unusual position of urging the Court not to grant certiorari from a decision by the Eighth Circuit Court of Appeals adverse to Ford, notwithstanding the contrary request of its co-defendants, Petitioners Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman ("Prestige"). If Ford, like Al Capp's Li'l Abner, had its "druthers," it would have preferred that the Court of Appeals affirm the District Court's judgment in favor of

Ford and Prestige. Nonetheless, we believe it is inappropriate for this Court to examine this case in its present posture.

Respondent Quality Mercury, Inc. ("Quality") has had a Mercury franchise supervised by the Lincoln-Mercury Division of Ford Motor Company. Quality has not had a Lincoln franchise. Prestige has had both Lincoln and Mercury franchises at its location, some 8 or 10 miles distant from Quality. For some time prior to the litigation, Quality had sought a Lincoln franchise. Ford had declined to grant the additional franchise because Prestige had been meeting the conditions imposed by an agreement reflected by a letter dated April 11, 1962.[1]

On October 1, 1974, Quality commenced this action against Ford and Prestige as part of its attempt to obtain a Lincoln franchise. Quality alleged that Prestige and Ford had combined and conspired to restrain trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by maintaining Prestige as the sole Lincoln

[1]The full text of this partially pleaded 1962 letter was brought to the attention of both the District Court and the Court of Appeals, not for consideration of matters outside of the pleadings but as explanatory of matters pleaded therein. *Austad v. United States*, 386 F.2d 147, 151 (9th Cir. 1967). The letter provided as follows:

> "In connection with your application for Lincoln and Mercury Sales Agreements in Minneapolis, you have inquired concerning our forward plans for the franchising of Lincoln in that market. Our present plan calls for one Lincoln dealer in Minneapolis and one Lincoln dealer in St. Paul.
>
> If you become the Lincoln-Mercury dealer as a replacement for Mitchell & Boyer, Inc., we would not propose any additional Lincoln representation in Minneapolis for at least two years and then only if Lincoln penetration of price class in the Minneapolis locality is less than District Average.
>
> As provided in the Lincoln Sales Agreement, we would discuss with you the need for additional Lincoln representation before any action is taken to appoint an additional Lincoln dealer in Minneapolis."

franchise in the Minneapolis area and by denying Quality a Lincoln franchise. Quality's Complaint alleged, *inter alia*, that Ford had no legitimate business reason for denying Quality a Lincoln franchise, and that Prestige had been allowed the right, "in its sole discretion, to determine if the Minneapolis market will be serviced only by its Lincoln dealership." Complaint, paragraph 17; Appendix E, p. A-32.[2] In addition, Quality argued before the District Court and the Court of Appeals that the 1962 letter of agreement served to grant Prestige a *perpetual* veto over the addition of any more Lincoln franchisees in the Minneapolis market area. In its Answer, Ford denied these assertions. Ford argued as well that the 1962 letter of agreement, see footnote 1, *supra*, could in no way be construed as granting Prestige a perpetual veto in the granting of new Lincoln franchises.

Some three months after the action was initiated, Prestige moved for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil Procedure. The District Court, the Honorable Earl R. Larson, granted Prestige's motion. Ford also moved the Court for judgment on the pleadings and its motion was likewise granted. Quality appealed the District Court's orders to the United States Court of Appeals for the Eighth Circuit. On September 27, 1976, the Eighth Circuit reversed the District Court's decision and remanded the case for further proceedings.

As will be observed, the District Court and the Court of Appeals placed quite different constructions upon the allegations contained in Quality's Complaint. The Court of Appeals held that Quality's Complaint, as construed by

[2]All citations to the Appendix herein will be to the appendices of the Petition.

it, stated a claim upon which relief could be granted and remanded the case for further proceedings. It is because the Court of Appeals' decision was premised squarely upon unusual (and, we believe, unwarranted) inferences given to Quality's Complaint that we conclude that this case is inappropriate for consideration by this Court at this time. The appropriate method of determining whether the facts are what the Court of Appeals construed the Complaint to allege is at trial, and not in this Court.

We emphasize that it is only the decision by Ford not to grant an additional Lincoln franchise to Quality which was attacked by Quality, not the nature of Ford's franchises or Ford's general franchising practices. Ford places no territorial restrictions on sales by its franchised dealers, nor does it preclude franchised dealers from dealing in other brands of automobiles. Ford's franchises are, by their terms, nonexclusive in such respects, and Ford reserves the right to add additional franchises in market areas if it should determine to do so on the basis of market analyses. The only assurances generally given franchised dealers are if an additional dealership is to be located within a certain distance of a pre-existing dealership, the need therefor must be demonstrated; they are otherwise not restricted.

The present case is, therefore, an unusual one in that it involves a letter of agreement by which Ford, different from its normal practices, gave minimal additional assurances to induce Prestige to take a Lincoln franchise for Minneapolis, *viz.*, that an additional Lincoln franchise would not be granted save under conditions specified in the letter, which had not occurred at the time of this lawsuit.

We believe it is also important to examine the record

upon which Prestige asks this Court to consider what it asserts is a critical Sherman Act question. The record in this case is not merely incomplete—it is nonexistent. The motions for judgment on the pleadings of Ford and Prestige were made and granted shortly after the action was instituted, and with no substantial discovery. Since the District Court granted Ford and Prestige judgment on the pleadings, the Court of Appeals could not and did not consider or decide factual matters in making its decision.

On motions for judgment on the pleadings, courts are required to accept as true all well-pleaded allegations. Ford denied all of Quality's substantive allegations, but was required to accept them as true in the lower courts, and would be obliged to do so in this Court. Thus, even if we assume that this case may present significant antitrust questions, we submit that it would be truly unfortunate to consider these questions now on a record that is, we believe, inadequate as well as inaccurate. This case is presently only interlocutory in nature, and not "ripe" for review. If the issues which Prestige presents are to be reviewed by this Court, such review should occur only of a decision after thorough exploration and exposition via discovery and trial of all pertinent factual matters. *Cf. White Motor Co. v. United States*, 372 U.S. 253, 295-64 (1963); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, (1918).

VI.

ARGUMENT

Petitioners suggest that the Court of Appeals' decision is unique and unprecedented, the effect of which is to endanger the right of manufacturers to select their customers by means of locationally exclusive franchise agreements. Ford, as the second largest manufacturer of motor vehicles in this country and one of the nation's largest "franchisers," has a special interest in preserving the integrity of its standard franchise agreements. Therefore, if Ford perceived the Court of Appeals' decision in the same manner as Prestige, we would urge this Court to review it. However, we believe that the Court of Appeals' opinion has no general impact on Ford's or other similar franchise agreements, but rather is applicable only to an unusual and unique set of circumstances.

Petitioners contend that the appellate court decision threatens the integrity of locational franchise agreements, because "[w]hat Quality has pled is purely and simply a vertical exclusive franchise agreement between Ford and Prestige and nothing more."[3] Petition, p. 5. The District Court concluded that Quality had failed to allege a violation of federal antitrust laws because it, too, concluded "that the plaintiff [Quality] had pled only an exclusive franchise agreement. . . ." Appendix A, p. A-8.

The Court of Appeals, however, viewed the Complaint through a different glass. Construing all factual allegations of the Complaint as true and drawing what it viewed as reasonable inferences and intendments from those facts in favor of Quality, *see National Metropolitan Bank v. United States*, 323 U.S. 454 (1945), the Court of Appeals interpreted the Complaint to include sufficient allegations to require that Quality have the opportunity to prove that:

---

[3]As noted above, the franchise is not exclusive except to prevent Ford from placing an additional dealer so-to-say, "across the street' without showing a need to do so. Ford franchises do not limit lines of cars to be sold nor to whom, nor prevent the dealers from selling cars anywhere.

(1) There was no valid business reason for Fords' refusal to grant an additional Lincoln dealership in the Minneapolis area (Appendix C, p. A-20);

(2) A horizontal competitor—Prestige—could, in its sole discretion, determine whether the Minneapolis market area was to be serviced by another Lincoln franchisee, *i.e.*, that a horizontal competitor possessed a total veto over the addition of any new franchise (*Id.*, pp. A-20 to A-21);[4] and

(3) Ford and Prestige were parties to an arrangement whereby a horizontal competitor had been granted *perpetual* veto power over all applications for additional Lincoln franchises in the Minneapolis area. (*Id.*, pp. A-16, A-22 n. 6.)

All of these allegations are denied by Ford. But, because of the issues they present, it is evident that the Eighth Circuit's decision lacks the sweeping implications seen by Prestige because it is specifically predicated upon the foregoing construction of the questions raised by the pleadings.

Indeed, the Court of Appeals' decision acknowledged the legitimacy and legality of the normal exclusive arrangement. The Court conceded that "[i]f Ford's refusal to deal with Quality was merely a unilateral or independent decision" there would be no illegal restraint of trade. *Id.*, p. A-16. Moreover, the Court of Appeals noted that "it is not an unreasonable restraint of trade for a franchisor to exercise his independent judgment as to with whom he chooses to deal." *Id.*, p. A-18. In addition, the Court of

[4]In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), the court held that permitting existing franchisees, collectively, to determine whether a new franchisee would be allowed to enter the market constituted a horizontal market allocation in violation of the Sherman Act.

Appeals quoted the language of this Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), where it was stated:

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. [citing United States v. Colgate & Co., 250 U.S. 300 (1919)]."

Therefore, we discern no real inconsistency between the decision in question and those of other courts upholding exclusive agency or franchise agreements in the face of Sherman Act challenges. *E.g., Wilson v. I.B.E. Industries*, 510 F.2d 986, 989 (5th Cir. 1975); *Williams v. Independent News Co.*, 485 F.2d 1099, 1104 (3d Cir. 1973); *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 640 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286 (6th Cir. 1963); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D. C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 903 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

Petitioners' counsel have done a thoroughly professional job of emphasizing what they view as the breadth of the Court of Appeals' holding and the impact of that decision on the dockets of the federal courts. However, we do not agree that the present case presents the dangers perceived.

Moreover, because the Court of Appeals' decision does not hold that locationally exclusive franchises are illegal, we are convinced that this case, in its present posture, does not present an important or unresolved federal question in need of consideration by this Court.

Prestige further asserts that the Court of Appeals' decision conflicts with prior decisions by other Courts of Appeals and by this Court. The foregoing discussion, however, indicates that any possible conflict is based on an overly broad construction of the holding by the Court of Appeals. We believe the Eighth Circuit's decision, insofar as it dealt with the validity of locationally exclusive franchise agreements, is altogether consistent with the law in other Circuits and with decisions of this Court. As we have previously suggested, a comparison of the Court of Appeals' discussion of exclusive franchise agreements with decisions by this Court and the other courts of appeals indicates that there is no conflict or inconsistency at all.

The basis for the Court of Appeals' decision to reverse for further proceedings was not its analysis of the legality of exclusive franchise agreements in general nor of locational franchises in particular; instead, the thesis was, we believe, a rather strained construction of Quality's Complaint. It seems clear from the Court's opinion that if, as we believe it will, the evidence displays a valid business reason for denying Quality a Lincoln franchise or that Prestige does not in fact have the power to veto an additional franchise at its sole discretion, or that the agreement between Ford and Prestige is not perpetual, then a Sherman Act violation will not have been established.

We cannot convince ourselves that the Court of Appeals committed such an error of law as to warrant review on

the present record. The only real question is whether the pleadings made a case for further proceedings before the District Court. While the Court of Appeals' decision that they did is not one which Ford views as correct, that decision does not, in our judgment, present "*cert*-worthy questions."

VII.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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January 10, 1977

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 1977, three copies of this Brief in Opposition were mailed, postage prepaid to Harold D. Field, Jr., attorney for Petitioners Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman, and to Charles A. Cox, counsel for Respondent Quality Mercury, Inc. I further certify that all parties required to be served have been served.

Henry Halladay, Counsel for Respondents Ford Motor Company and Ford Marketing Corporation